SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1917

No. 656

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, AND CHARLES BAKER, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA,
DEFENDANT IN ERROR,

AND EIGHT OTHER CAUSES, NOS. 663, 664, 665, 666, 680, 631, 702 AND 738.

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Since many briefs are before the Court in these cases, there is no intention of repeating in this one any comprehensive general demonstration of the unconstitutionality of the Conscription Act. Its purpose is to present separately and distinctly a case against the Act from the point of view of

those who object to participation in this war on grounds of conscience.

Of course there are wide differences among conscientious objectors. Some base their beliefs and conduct upon their duty towards God; others upon their duty towards Man. In each class individual views vary as widely as individual powers of coherent statement. Underlying the differences, however, is a unity which permits the treatment of the point of view of the conscientious objector as a single one. Norman M. Thomas clearly stated it in an article entitled "War's Heretics," which appeared in the August 11, 1917, issue of the *Survey*:

> "In short, conscientious objectors include Christians, Jews, agnostics and atheists; economic conservatists and radicals; philosophic anarchists and orthodox socialists.
>
> "It is not fair, therefore, to think of the conscientious objector simply as a man who with a somewhat dramatic gesture would save his own soul though liberty perish and his country be laid in ruins. I speak with personal knowledge when I say that such an attitude is rare. Rightly or wrongly, the conscientious objector believes that his religion or his social theory in the end can save what is precious in the world far better without than with this stupendously destructive war."

Millions of Americans would find it impossible to believe, even if this Court should so hold, that our fundamental law secures no place in democracy for persons of such conviction. It lies deep in the moral foundations of every one who has been an American schoolboy that the cardinal excellence of our government is that it assures, to all men at all times, freedom—which, to mean anything, must mean freedom to believe as individual judgment and conscience may direct, and, within certain limits of public morals, to govern conduct accordingly. The Constitution expresses the guaranty of such

freedom both indirectly, by recognizing the retention by the people of their unenumerated natural rights (Amendment IX), and directly, by forbidding Congress to make laws prohibiting the free exercise of religion (Amendment I).

The Conscription Act, by constraining violation of conscience, prohibits the free exercise of religion to all conscientious objectors, whether their objection rests upon their duty towards God or their duty towards Man.

(a) *The Inadequacy of the Provision of the Conscription Act for the Exemption of so-called "Religious" Objectors.*

The Conscription Act provides for the *partial* exemption of a small fraction of the "religious" conscientious objectors:

> "Nothing in this act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized or existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant."
>
> Act of May 18, 1917, Sect. 4.

In the eighteenth or early nineteenth centuries it might have been reasonable to hold negligible for practical purposes such religion as was not connected with "any well-recognized religious sect or organization at present organized and existing." Nearly every one's sacred beliefs had relation with a Deity, and nearly every one adhered to the forms and tenets of some well-recognized sect or organization.

But now for a long time this has not been so. Our period is often thought of as one in which organized religions tend to decay and disappear. Old organizations such as Roman Catholicism and evangelistic and Protestant bodies here and there, and new ones such as Mormonism and Christian Science, demonstrate a surviving power over conduct and conscience. But the time when the religious devotion of *all* men, or even of *most*, submitted as a matter of course to organized guidance has long since passed. Churches founded by the grandfathers of men who fought at Lexington no longer even open their doors on Sunday for congregations which would not come. To maintain nominal connection with an hereditary religious establishment is no longer important even to respectability.

That religion has tremendously overflowed, even if it has not yet quite obliterated, the boundaries of organized sects, would hardly be debatable even had it never been authoritatively declared. It was so declared by this Court as early as 1889, though Congress in 1917 seems unaware of it. Justice Field, in *Davis vs. Beason*, 133 U. S., 342, said:

> "It" (referring to *religion*) is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The First Amendment . . . was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others."

The inadequacy of the exemption clause in the Conscription Act is apparent. The Act effectually denies free exercise of religion even to devout persons who regard non-participa-

tion in the war as among the duties imposed by their relations with their Maker, *unless* they happen to be members of a particular sect which includes pacifism in its *cultus*. And even if they belong to such a sect, their right to free exercise of religion is at the discretion of the President.

(b) *Free Exercise of Religion in its Broader Aspect.*

Many persons who base conscientious objection to military service squarely upon the duties imposed by their relations to their Maker are now in jail or the cantonments. Such persons, however, are only part of those whose fundamental beliefs are outraged by the Conscription Act. The Constitution protects these others, too, even though Justice Field's definition is not, literally construed, broad enough to cover them.

Justice Field's definition was accurate for practical purposes only so long as the custom was still general of weaving matters of right and wrong into relation with the will and purposes of a putative Maker. God was commonly supposed, for example, to have views upon such matters as dancing and card-playing. Though intelligent men may have laughed at such crudities, they were neither shocked nor surprised by them. The personal imminence of a Maker was taken for granted.

The twentieth century, however, must and does recognize that religion can surpass and omit all notion of relations with a Maker. For much religion nowadays has done more than escape from churches. It has escaped also from theology. It is still possible for Billy Sunday to state that Jesus hates a pacifist. But many men take responsibility for their beliefs themselves instead of putting it upon a deity.

Do beliefs so self-shouldered lose sanctity? Must the conduct which flows from them do without the constitutional protection which would unquestionably attach were they arbitrarily associated with divine revelation?

> "'He believes in No-God, and he worships him,' said a colleague of mine of a student who was manifesting a fine atheistic ardor; and the most fervent opponents of Christian doctrine have often enough shown a temper which, psychologically considered, is indistinguishable from religious zeal."
>
> William James, The Varieties of Religious Experience, page 35.

It is the psychological fact, not its theological suit of clothes, which the First Amendment to the Constitution protects.

The framers knew something of fanaticism, intolerance and persecution. They realized that under stress of conviction as to matters of pre-eminent import, even the wisest, most sincere and most humane sometimes lose sight of their own human fallibility and see no wrong in forcing others to walk in paths of which they themselves feel sure. And they intended that under a government founded upon the proposition that men are entitled to life, liberty, and happiness if they can find it, no man's soul should be shamed or aroused as, for example, a Roman Catholic's would be by statutory compulsion to defile the image of the Virgin. They were dealing for time to come with matter of substance, not with externalities. At a time when Protestant Christianity was practically universal, contemporary utterances as to freedom of conscience were naturally as a rule colored by allusions to the church and the Deity. But these utterances clearly intimate that the substance of freedom of conscience was perceived and intended. Jefferson, for example, in his address to the Danbury Baptist Association (8 Jefferson's Works, 13; quoted in *Reynolds vs. U. S.*, 98 U. S., 145, at 164), said this (italics ours):

> "Believing with you that religion is a matter which lies solely between man and his God; that he owes

> account to none other for his faith and worship; *that the legislative powers of the government reach actions only, not opinions,*—I contemplate with sovereign reverence that act of the whole American people which declared that their Congress should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and state. Adhering to this expression of the supreme will of the nation *in behalf of the rights of conscience*, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced that he has no natural right in opposition to his social duties."

Chief Justice Waite's interpretation of this utterance is as follows:

> "Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. *Congress was deprived of all legislative power over mere opinion*, but was left free to reach actions which were in violation of social duties or subversive good order."

Another statement of Jefferson's (1 Works, 45; also quoted in *Reynolds vs. U. S.*, at page 163) is still more clear-cut and illuminating. This was in the preamble to the Virginia bill "for establishing religious freedom," which he drew in 1785:

> "To suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy which at once destroys all religious liberty."

The view that the framers of the Constitution meant to protect the *right to think and believe*, regardless of association

with church or Deity, is thus supported by contemporary evidence as well as by sensible inference. And since a man's religion is thus in effect synonymous with the beliefs he holds sacred, an *exercise of religion* occurs whenever he does or refrains from doing anything whatever by reason of belief and under penalty of spiritual self-disgrace.

The religious character of faith or conduct is not affected by its reasonableness or probable or possible rightness. Faith springing from instinct, tradition, or superstition may be as sacred as that which springs from the reasoning processes of well-informed intelligence. For, since everything human is fallible, there is no authoritative criterion of the rightness of anything. The blindest arbitrary assumption has at least the chance of being as right as reason. For reason itself in the last analysis only guesses. It guesses not only at conclusions of conduct, but also at the diagnosis of determining conditions and the appraisal of the relative weight of facts—as for example those bearing upon the precise nature and proximity and relative seriousness of foreign and domestic menaces of oppression or military autocracy.

The genuine intensity of belief is the one criterion of its religious character and that of the conduct it induces.

American participation in the war is superlatively an exercise of religion in this sense. The depth and fervor of conviction in ordinary men and women as well as in the President and other statesmen must at times move even those who profoundly disagree.

Conscientious refusal to take part in the war is equally an exercise of religion. He who believes in democracy and more democracy as the means of carving out for populations as well as for favored individuals the possibility of good lives, and at the same time feels that the progress of the democracy in which he believes will be thwarted instead of served by the

war, may believe that he cannot put on a uniform and go out to kill and die without a shame at least as deep as that of his fellow citizen whose spirit was abased because America held off for so long. And the shame of both is the same kind of shame as that of the Protestant renegade who denied his faith at the doors of the Inquisition.

It is recognized that the right to conform conduct to conscience is subject to the limitation declared in the Mormon cases—that the conduct must not be such as to outrage the moral sense of the community. Works of death in general shock that moral sense. That is why passionate advocates of war were on their part denied free exercise of religion until the Act of Congress, declaring war, had changed morality.

Can it be that this Act of Congress has not only changed, but completely reversed morality? It will not be held that views shared in December, 1916, with a President whose authority to represent the moral sense of the people had just been demonstrated by an election, have become so outrageous that their holders are outlawed, and must now submit as their various temperaments may direct to such processes of extinction as the mobs and governments of their country shall from time to time administer.

CONCLUSION.

At this time of hyper-religious intensity of faith and feeling, it has been seriously advanced by eminent men, without thought of disrespect, that it may be a "higher duty" of this Court, under some sort of "unwritten law," to disregard the Constitution. Ex-Senator Elihu Root, for example, in an address before the Conference of Bar Associations (reprinted in the West Publishing Company's Docket for November, 1917) said this:

> "What is the effect of our entering upon this war? The effect is that we have surrendered, and are obliged to surrender, a great measure of that liberty which you and I have been asserting in court during all our lives—power over property, power over person. This has to be vested in the military commander in order to carry on war successfully. *You cannot have free democracy and successful war at the same moment.* The inevitable conclusion is that, if you have to live in the presence of a great, powerful military autocracy as your neighbor, you cannot maintain your democracy."

There is no reason why the answer which this Court gave to such reasoning in Civil War times should not hold now:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of the government. Such a doctrine leads directly to anarchy or despotism."
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> *Ex Parte Milligan*, 4 Wall. 2.

The time has not come yet for America to declare that freedom is a failure.

Respectfully submitted,

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